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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 SECURITIES AND EXCHANGE  
4 COMMISSION,

Plaintiff,

v.

14 MC 30 (P1)

6 WALTER V. GERASIMOWICZ,

7 Defendant.

8 -----x

9 New York, N.Y.  
10 March 7, 2014  
3:00 p.m.

11 Before:

12 HON. JOHN G. KOELTL,

13 District Judge

14 APPEARANCES

15 HOWARD A. FISCHER  
16 JOHN J. GRAUBARD  
Attorneys for Plaintiff SEC

17 WALTER V. GERASIMOWICZ  
18 Pro Se Defendant

E373SECC

(In open court)

THE COURT: This is SEC v. Dr. Gerasimowicz. Will the parties tell us who they are for the record, please.

MR. GRAUBARD: John Graubard for Securities and Exchange Commission.

MR. FISCHER: Howard Fischer for the Securities and Exchange Commission.

MR. GERASIMOWICZ: Walter Gerasimowicz, pro se.

THE COURT: This is the SEC's application for an order under Section 20(c) of the Securities Act, and Section 21(e)(1) of the Securities Exchange Act enforcing compliance with a commission order.

So I'll listen to the commission first.

MR. GRAUBARD: Thank you, your Honor. The commission entered a finality order on September 17, 2013, which ordered the respondents, Dr. Gerasimowicz and two companies, to pay disgorgement, prejudgment interest, and a civil penalty. This amount has not been paid. The commission therefore is bringing this as a summary proceeding to obtain a court order to enforce the commission order.

Under established law, such as *Securities and Exchange Commission v. Pinkas*, there are no defenses, merit defenses to such an application. If the respondent had wished to raise those objecting to the order, that would have to have been brought to the Court of Appeals under Section 25(a) of the

E373SECC

1 Exchange Act.

2 Basically very briefly, the respondents, while  
3 represented by counsel before the commission, consented to an  
4 order which found they had violated the securities laws and  
5 making material misrepresentations by misappropriating and  
6 misusing funds and otherwise violating the Advisers Act.

7 The only issue left open before the administrative law  
8 judge was the amount of disgorgement and the civil money  
9 penalty. The administrative law judge made such a finding.  
10 The respondents did not appeal that to the commission, did not  
11 seek review from the Court of Appeals. And therefore, we are  
12 here asking that the Court enter that as an order.

13 We don't believe any of the defenses that were  
14 asserted by Dr. Gerasimowicz are actually properly before the  
15 Court, but we will respond to them on the merits if he should  
16 raise them.

17 And again, the one case I did not cite in my papers  
18 which is very relevant is the *Altman v. SEC* case, at 687 F.3d,  
19 44. Where the Second Circuit held basically that --

20 THE COURT: 687 F.3d.

21 MR. GRAUBARD: 44. Second Circuit 2012. District  
22 courts do not have jurisdiction to review decisions of the  
23 commission. That is reserved to the Court of Appeals.  
24 District courts only can enforce the decisions. Thank you.

25 THE COURT: All right. Dr. Gerasimowicz.

E373SECC

1 MR. GERASIMOWICZ: Yes, your Honor. Again, I'm  
2 representing myself in this proceeding pro se. And the two  
3 companies that are listed as defendants in addition to myself  
4 are defunct and have been for at least two years.

5 I've seen the reply of the SEC to my answer, and the  
6 memorandum of law which I attempted to read. I also tried to  
7 read the cases which were cited by the SEC. And it was only a  
8 few days ago that I received them, a 2-inch thick, maybe 3-inch  
9 thick set of cases, and I'm uncertain how much I understand in  
10 that. I only received it a few days ago. But to the best of  
11 my ability, I would like to respond if I may.

12 THE COURT: Of course.

13 MR. GERASIMOWICZ: Before I do, however, I'd like to  
14 clarify something that was in the reply memorandum of the SEC.

15 I'm born in this country and am a U.S. citizen. I'm  
16 not a foreigner, despite my Russian last name. Two of the  
17 cases the SEC has included seem to have something to do with  
18 aliens and their rights which doesn't apply in my case. *Romero*  
19 *v. U.S. Immigration Service* and *Debeatham v. Holder*. I don't  
20 quite understand the relevance of that, or is this due to the  
21 fact that I have a strange sounding last name.

22 I'm challenging the SEC --

23 THE COURT: The answer to that is no. Those cases  
24 aren't being used to ask that any inference be drawn against  
25 you because of your name, and the Court would never do that.

E373SECC

1 MR. GERASIMOWICZ: Thank you. I'm challenging the  
2 SEC's request to enforce its order based on the fact, firstly,  
3 that the administrative law judge and the hearing process was  
4 highly unfair and prejudicial. Secondly, I did not have a  
5 chance to present and have my defenses heard. And third, I did  
6 not have an opportunity to request a waiver on the basis of my  
7 complete lack of assets.

8 First, the ALJ process, the administrative law judge,  
9 why do I view that it lacked fairness. The SEC did not say  
10 everything up front in their damages brief. They left key  
11 assertions out, which they put into their reply, knowing that  
12 according to the rules, I would not be permitted to make a  
13 sur-reply. A fact that they knew, and that I didn't know. And  
14 they said a number of things in their reply which were simply  
15 not true, and I never had a chance to challenge them based on  
16 procedure.

17 The fact is, basically, they tricked me, and I feel  
18 they tricked my attorney at the time. If I had been given a  
19 fair hearing and a chance to explain, I think the outcome would  
20 have been different.

21 Now, in this proceeding, they are replying to the  
22 sur-reply which I submitted as an exhibit. In effect, they may  
23 have reopened this possibility, and what I'd also like to do is  
24 go to page seven if we could of the petitioner's reply  
25 memorandum. Paragraph B.

E373SECC

1 THE COURT: What page?

2 MR. GERASIMOWICZ: Page seven, please.

3 THE COURT: Okay.

4 MR. GERASIMOWICZ: In the second sentence, there is a  
5 false statement. Specifically they assert that the investor  
6 funds which were invested in and used to purchase litigation  
7 assets from the bankruptcy estate of SMC Electrical Contracting  
8 Inc. should not be subject to disgorgement of such amounts.

9 Now, the fact is that I did not use investor funds in  
10 any way, shape or form to purchase litigation. And that's a  
11 falsehood. That money was borrowed, and it was borrowed by me  
12 personally in order to purchase that litigation. And at the  
13 same time, to defend -- to bring claims against those who are  
14 at fault here. It was a process of salvaging, and instead I  
15 was being hammered.

16 In essence, let me indicate, your Honor, that those  
17 were borrowed moneys, and those moneys themselves should not be  
18 disgorged. They were not investor moneys in any way, shape or  
19 form. This again is the second time that the SEC has made this  
20 claim, and they did not allow us to defend that in any way,  
21 shape or form.

22 These, quite frankly, let me continue. As I say, they  
23 have reopened that. Secondly, I believe and previously my  
24 former attorney advised me that I have strong defenses against  
25 the SEC's decision, but I didn't have the opportunity to

E373SECC

1 present them. My biggest defense is that I never received the  
2 funds.

3 THE COURT: I'm sorry, you never received?

4 MR. GERASIMOWICZ: I never received the funds that the  
5 SEC is ordering me to disgorge. Disgorgement, as I understand  
6 it, is supposed to be a method of forcing a defendant to give  
7 up the amount by which he was unjustly enriched. How can I  
8 give up something I never received?

9 The SEC reply also mentions a case involving a person  
10 called Contorinis that was in their paperwork and said it was  
11 the same as my case. My reading of it tells me it isn't the  
12 same as my case whatsoever. I read the summary that they  
13 included. This was about a man who did insider trading and  
14 gave tips, he was a tipper to his family and friends. He  
15 didn't get rich, but his family members and a fund he owned  
16 did.

17 My situation here is completely different. The  
18 investor funds that were lost in my case were not paid to me or  
19 my family or to funds or companies that I owned. They went to  
20 third parties where I had no ownership at all. In fact, these  
21 funds were embezzled or stolen by other people who had  
22 fiduciary duties to SMC, to that company. And that's been  
23 indicated now and set forth in several court filings that I am  
24 pursuing against these parties.

25 I did not know what was occurring within that company,

E373SECC

1 I was defrauded, and at the same time, there was theft that  
2 occurred here. I'm a victim here as well.

3 I'm not saying that I didn't make mistakes, your  
4 Honor. But, the fact of the matter is, when I brought this to  
5 the attention of Mr. Fischer, and indicated and asked him at  
6 that time if we could have a tolling period to try to recover  
7 money for investors, he replied, and this is when I presented  
8 these facts, not opinion, to the SEC. Mr. Fischer stated very  
9 coldly and callously that that was my problem. Not his. That  
10 the SEC doesn't care about investors, they only care about  
11 punishment. And those were his words. I didn't know that was  
12 an SEC policy until I heard them.

13 Now, again, I believe that I have strong defenses  
14 against the SEC's decision. But I didn't have the opportunity  
15 to present them. As I said, my biggest defense is that I never  
16 received the funds the SEC is ordering me to disgorge.

17 Now, I understand now that the appeal process was  
18 available to me in a pro se fashion. But at the time, I  
19 couldn't afford an attorney, and I did not believe that I could  
20 appeal pro se. I certainly would have appealed if I understood  
21 how this process worked.

22 To be clear, I'm not claiming, also, that the  
23 government should provide me with an attorney. In spite of  
24 what they've written in their papers, in their reply. I would  
25 just like an opportunity to state my case and my defenses in a



E373SECC

1 fair forum, even if I have to do it pro se.

2 Thirdly, I have no assets. I have no way of making a  
3 living. And the administrative law judge never said that my  
4 assets or the lack thereof could be a factor, and I was never  
5 told about the waiver request process. Otherwise I would have  
6 asked for one. I realized that submitting a waiver request is  
7 no guarantee, but I would like a chance to at least try.

8 Right after receiving a copy of the SEC request, I  
9 spoke to Mr. Graubard and told him I had no assets, and he  
10 offered to discuss a settlement for a smaller sum or a payment  
11 plan of some type. I had a conference call with him and  
12 Mr. Fischer, and they told me they wouldn't even talk to me or  
13 couldn't talk to me unless I accepted the order as is and then  
14 let them put a lien on my home. That seems rather unfair to me  
15 as well. If I had agreed to the order, it seems I would be  
16 giving up any rights to challenge or appeal it.

17 In summary, I feel I've been subjected to an unfair  
18 process and did not have a chance to defend myself. And I'm  
19 requesting that your Honor reinstate the process so that I can  
20 get the administrative law judge's decision and the SEC's  
21 disgorgement order looked at by someone outside of the SEC if  
22 possible. If that possibility is within your jurisdiction, I  
23 would appreciate it.

24 Thank you for your attention, your Honor.

25 THE COURT: Thank you, Doctor.

E373SECC

1 MR. FISCHER: Your Honor, if I may quickly, as I am  
2 the Mr. Fischer to whom the defendant referred. I would just  
3 like to state for the record that Dr. Gerasimowicz's  
4 recollection of our discussions are, to be charitable,  
5 inaccurate. They're inaccurate in terms of both the statement  
6 as to what was said in those discussions with respect to the  
7 SEC's attitude towards investors. Secondly, they are  
8 inaccurate because at least with defendant's counsel, the  
9 subject of a waiver was discussed at great length, and was part  
10 of those discussions and the pretrial procedures as well as in  
11 the damages procedures and applications before the ALJ.

12 I can't obviously speak to what was communicated to  
13 the defendant about those discussions, but the Court should be  
14 assured that the remedy of a waiver was part of those  
15 discussions and was discussed at some length.

16 MR. GERASIMOWICZ: Your Honor, if I may just follow up  
17 for one moment. When those statements were made by  
18 Mr. Fischer, there were others in the room who would attest to  
19 that.

20 THE COURT: All right. Mr. Graubard.

21 MR. GRAUBARD: Yes, your Honor. I basically, the  
22 issue here is whether this Court has jurisdiction to hear the  
23 objection about the amount of disgorgement. Our position is it  
24 does not.

25 We're not saying that, for example, that

E373SECC

1 Dr. Gerasimowicz could not possibly go back to the commission  
2 and ask for it to hear a late appeal. I don't know if that's  
3 possible. But, the point is that once the time ran for seeking  
4 judicial review from the Court of Appeals, he does not have a  
5 method of obtaining judicial review of the commission decision,  
6 unless the commission were to reopen it. And I'm not passing  
7 on whether that could or could not occur, because that is  
8 something we would not be dealing with at this level.

9 Otherwise, the only thing I would add is under the  
10 Contorinis decision of February 18, the point of that decision  
11 is not whether it was insider trading or misappropriation or  
12 offering fraud, it is that the amount of disgorgement does not  
13 have to equal the amount that the defendant personally  
14 obtained. It is the basically the amount that the investors  
15 lost. And that's what we're seeking to disgorge from whomever  
16 was responsible for the loss. Thank you.

17 THE COURT: A couple of questions. In your papers,  
18 you seem to ask for prejudgment interest on disgorgement. You  
19 also seem to ask for interest on the civil penalty. But the  
20 order from the commission didn't seem to provide for interest  
21 on the civil penalty.

22 MR. GRAUBARD: No, the order from the commission does  
23 not provide specifically for that. That is found in 31, United  
24 States Code, Section 3717, which is the statute which says when  
25 a debt is owing to the United States, the agency may ask for

E373SECC

1 interest. The disgorgement interest is provided by Rule 600 of  
2 the commission's rules and practice.

3 THE COURT: The order from the commission was based on  
4 the violation of the Securities Act, violation of the  
5 Securities Exchange Act, and violation of the Investment  
6 Advisers Act.

7 MR. GRAUBARD: Yes, your Honor.

8 THE COURT: The proceeding that you've brought before  
9 me is based on the provisions for enforcement of orders under  
10 the Securities Act and the Securities Exchange Act, but not  
11 under the Investment Advisers Act.

12 MR. GRAUBARD: That is because of the provision of the  
13 Securities Act 20(c) applies to violations of that act. 21(e)  
14 of the Exchange Act applies both to the Exchange Act and to any  
15 other provision of the federal securities laws. The Advisers  
16 Act, the Investment Company Act, so it would take in  
17 everything. It wasn't repeated for the other chapters.

18 Historically, the Securities Act was originally  
19 administered by the Federal Trade Commission. The Securities  
20 and Exchange Commission was created by the Exchange Act.  
21 That's why there is duplication between the two.

22 THE COURT: That is your authority for the Investment  
23 Advisor --

24 MR. GRAUBARD: Yes, 21(e) says a violation of any part  
25 of the Securities Act.

E373SECC

1 THE COURT: Okay. The damages award action,  
2 disgorgement, and the damages award were not divided up in any  
3 way between the three acts, right?

4 MR. GRAUBARD: It was not -- not in the finality  
5 order. If you were to parse the decision of the administrative  
6 law judge, she did break it down by various violations.  
7 Whether it was misappropriation or misstatements or other  
8 violations. It could be broken down that way, but it was not  
9 for the purpose of the finality order.

10 THE COURT: Could it be broken down even as to the  
11 Investment Advisers Act as opposed to the Rule 10b-5?

12 MR. GRAUBARD: Yes, it could. Again, she did deal  
13 with each as a separate item, so it could be broken down for  
14 that purpose.

15 MR. FISCHER: Your Honor, as the trial counsel on the  
16 case, the acts that were the subject of the proceeding could  
17 independently, well -- could -- did and were found to have  
18 independently violated each of the various securities claims.  
19 So if we had brought just the 206 case, just the 17(a) case or  
20 just the 10-b case, the disgorgement amount would have been the  
21 same whether it was one, two, or three separate statutes.

22 THE COURT: Similarly, the civil penalty?

23 MR. FISCHER: Yes.

24 MR. GRAUBARD: The civil penalty was imposed by the  
25 administrative law judge on a per investor basis. So she

E373SECC

1 didn't multiply violations. She just said this is the penalty  
2 for each investor, and I'm multiplying it by the number of  
3 investors. So it would not matter in that case where she found  
4 the violation.

5 THE COURT: Okay. That answers all of my questions.  
6 I'll take the matter under advisement. Thank you all.

7 MR. GRAUBARD: Thank you.

8 MR. GERASIMOWICZ: Thank you.

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